



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION 198 OF 2002

**IN THE MATTER OF THE ESTATE OF LATE M'RICHUNI ALIAS M'MUREMERA
M'RINCHUNI ALIAS M'RINJURI.....**

.....DECEASED

KIRIINYA NEWTON NAIBAE.....PETITIONER

V E R S U S

M'ARITHU M'KUJOGA.....OBJECTOR

THE LAW OF SUCCESSION

Upon intestacy an adopted child may inherit the land ss.32 & 33

The Law of Succession Act.

Cap 160, Law of Succession Act.

JUDGEMENT

By a petition for Letters Administration Intestate dated 11.6.2002 and filed on 26.06.2002 one KIIRINYA NEWTON NAIBEA (the Petitioner) petitioned to this court for a Grant of Letters of Administration Intestate of the estate of one M' MUREMERA M'RINCHUMU ALIAS M'MUREMERA M'RINJURI who died on 13.05.2001 (the deceased)

According to the Affidavit in support of the Petition for Letters of Administration intestate sworn by the Petitioner on 11.06.2002, the deceased left the following surviving him –

1. KIRIINYA NEWTON NAIBAE - SON
2. ERIC MUTUMA OBADIAH adult – purchaser for quarter acre of Land Ref. NYAKI/NKABUNE/67.

Notice of the Petitioner appeared in the Kenya Gazette Notice No.4931 of 2nd August 2002 and the Petitioner was issued with a Grant of Letters of Administration on 14th January 2003. Exactly five months later and without any explanation why the Grant should be confirmed in less than six months, the

Petitioner by a Chamber Summons dated and filed on 13th June 2003 sought to have the Grant of Letters of Administration confirmed.

Perhaps because the six (6) months had not even expired since it was issued the Petitioner's application was not heard, and has not been heard at all. It left room and opportunity for one M'Arithi M. Kujoga (in this judgment referred to the Objector) to file an application dated 22nd April 2004 for the revocation and/or annulment of the Grant on the usual and common grounds-

(a) The proceedings to obtain the grant were defective and not accompanied by consent or waived by any person contemporaneously as by law entitled to apply.

(b) The grant was obtained fraudulently and by making of false statements and by concealment from the court of facts which were material to the case which if disclosed to court would have led to different orders from those thought.

(c) The costs of the application be provided for.

In his Affidavit of the Summons for the Revocation or Annulment of Grant the Objector avers as follows:

- (1) that the deceased died intestate and had no children (para 3)
- (2) That the Petitioner is not the adopted son of the deceased as alleged and was not entitled to be granted the same (para 4).
- (3) That application for the grant was made secretly and without involvement of all the beneficiaries (para 5)
- (4) That the grant was obtained fraudulently in that the petitioner made "a fake" statement to the court.

The objector concluded that for these reasons, the Grant be revoked and/or annulled. To the application for provocation or annulment of the Grant the Petitioner filed a seventeen (17) paragraph Replying Affidavit the relevant paragraphs of which are:-

- (1) that the objector is a stranger and has no colour of right whatsoever to claim anything as the beneficiary of the estate of the deceased (para.5)
- (2) that the Applicant is merely a neighbour and has no blood relationship with the deceased (para 6)
- (3) that the Objector's land Ref. No. Nyaki/Nkabune/250 was adjacent to the deceased's land Ref. NYAKI/NKABUNE/67 which is the subject of this cause which the objector sold...(para, 7)
- (4) that the Petitioner is the son of the deceased and that the remains of the deceased were released to the Petitioner for burial and the Petitioner buried the deceased in land Ref. No. NYAKI/NKABUNE/67 as shown by the burial Permit and a letter from the Chief, (Para.8),
- (5) that the consent for the filing of the cause was not relevant in the cause since the deceased was survived by one Dependant, the Petitioner (para 9).
- (6) that the Objector had not demonstrated in his application what interest he had since he alleged that the deceased had no children;(para 11)
- (7) that the cause was properly filed, gazetted in the Kenya Gazette and the temporary letters of administration of the estate of the deceased were issued to the Petitioner (para 12),
- (8) that the deceased granted to the Petitioner as his son, permission to be married on the land Ref; NYAKI/NKABUNE/67 and paid dowry on behalf of the Petitioner as required under Kimeru customary

law and practice. (para 13),

(9) That the Petitioner has been living on the land Ref No. Nyaki/Kithoka/7 and has sired 7 children on the said land who are the grand children to the deceased before the death of the deceased on 13th May 2001, (para 14).

Again for those reasons the Petitioner prayed that the Objector's application be dismissed with costs and the Petitioner's application for Confirmation of the Grant dated 13th June 2003 be allowed as prayed.

Not to be out-done or out-boxed, the objector fired a further volley by way of a Replying Affidavit (should have been properly titled ("**Further Replying Affidavit**") sworn and filed on 2nd December 2004 and puts a little more flesh to his objection, and claim to the inheritance of the deceased's land-NYAKI/NKABUNE/67 and depones that the Objector is no stranger to the estate of the deceased because;-

(1) the Objector's father and the deceased's father were brothers and hence he is a cousin to the deceased (para 2,3 & 6).

(2) the deceased left no survivors at the time of his death and thus, the Objector is the immediate next of kin to the deceased and therefore entitled to inherit the deceased's property land i.e. NYAKI/NKABUNE/67 measuring 0.73 ha. (para.4).

(3) that the chief's letter was misleading and should be ignored (because it was given to the wrong person (the Petitioner) (para. 8).

(4) that the Petitioner is not an adopted son, or son of the deceased but only lived on the deceased's land and was only a tenant thereon (para. 5 & 9).

In addition to the said affidavits, both Objector and the Petitioner called oral evidence in support of their conflicting claims.

O.W.1 (Objector's witness No.1) was the objector himself. This was his evidence. The Petitioner has no right to apply for letters in this cause. The deceased was his paternal uncle's son, who was called **M'Rinchuri M'Ambao** while his father was called Kunjoga M'Mbao. He did not know the Petitioner's father and confirmed that the deceased was neither married nor had any children, and the grant should be issued to him as nearest kin.

When cross-examined by Mr. Kosgey for the Petitioner the Objector testified that the deceased had married twice but had not been blessed with any children but that the deceased was his uncle. He had started seeing the Petitioner after he came out of detention after Independence. He had been detained for three (3) years.

The Objector further testified that the Petitioner came to live in and built a house on the land, and worked as a labourer and was living on the land even before the deceased fell sick. The objector confirmed that the Petitioner is married but did not know who paid for his dowry.

O.W 2 was M'Richari M'Igweta. He testified that he knew both the deceased and the objector, who both came from his Ambombugi clan. He also knows the Petitioner, who is not related to the deceased, that he was only hired to construct houses, whereas the deceased was uncle to the Objector. This witness also confirmed that although the deceased married severally, he had no children and that the Petitioner was not a son to the deceased.

In cross-examination the witnesses confirmed that the Petitioner obtained the burial permit but the deceased was buried by his clan, and thereafter the Petitioner was left on the land, but reiterated his evidence in chief that the Petitioner only came to construct a house.

O.W.3, was M'Mugongo M'Irura. He testified that he knew both the Objector and the Petitioner but that the Petitioner was not related to the deceased who died while living with the Petitioner as he had no children of his own. The Objector was nephew to the deceased.

In cross examination by Mr. Kosgey O.W.3 testified that he knew the Petitioner. He had **“constructed a house a long time ago”**

O.W. 4 was one M'Mutungi M'Rukunga. His testimony was to the effect that he knew the deceased and the Objector who was nephew to the deceased. He did not know the Petitioner. The deceased died without having any child. Mr. Kosgey learned counsel for the Petitioner did not cross-examine D.W.4

The Petitioner gave oral evidence and called one witness in addition to his own testimony. As P.W.1 Newton Kiriinya the Petitioner testified that he is both a contractor (of houses) as well as a farmer. He reiterated the averments in his Replying Affidavit to the Objector's Application. He is the adopted son to the deceased. He was not his biological father. He had lived with the deceased since his childhood on land parcel No. NYAKI/NKABUNE/67. He paid 5 cows for his dowry. He had not been hired to construct a house for the deceased, he constructed the house because the deceased was his father. The Petitioner further testified that the Objector should not inherit the land. The objector had taken a loan on his own land which had been sold, and that the Objector was now landless and hence his claim on the deceased's land.

When cross-examined by the Objector the Petitioner reiterated that it was he, and not the Clan who had buried the deceased, and the plot No 67 belonged to him the Petitioner, that the Objector was nowhere to be seen when he the Petitioner constructed a house for the deceased and that when the deceased was buried no one among the deceased's brothers told the Petitioner not to touch the deceased's body and that no one of them raised any issue about the issue or that the deceased had instructed him not to touch his land or property, that the deceased took care of him and hence he called him his father.

The Petitioner testified further that he had lived with the deceased for over 20 years, and that when he filed this cause he had informed his father's (deceased's relatives) and that none of them had told him to move out of the land; including the sisters of the deceased. He was not trying to take the land forcefully he had not entered into the land by force.

P.W.2 was one Cicilia M'Rukaria who was sister to the deceased. He was her brother. He was married twice but had no children of his own so he adopted the Petitioner, Kiriinya as he took care of him. He was buried in Kiriinya's (the Petitioner's shamba). She testified that the Petitioner was married with **“big”** (i.e. adult) children. She herself lives with her husband in her husband's shamba and that when her husband died he left his shamba to her. The Petitioner had married while living with the deceased who also paid dowry for the Petitioner.

The Objector when asked by the Court to Cross-examine P.W.2, said **“I have no questions to put to this witness because I do not know her. She does not even stay in the area of the deceased and she does not even know where the Petitioner lives. Her story is lies.”**

When re-examined by Mr. Matutu by the Petitioner's counsel, P.W2 stated, **“I know the dispute. I have not been hired to lie in this court. When my husband was alive the objector had a dispute with my husband. When my husband died, he took his dispute to this land. The objector sold his land. He lives in rented premises. He is not even my neighbour.”**

ANALYSIS

What emerges from the Objector's application for revocation and/or annulment of the Grant to the Petitioner, the Supporting Affidavit and the Further Replying Affidavit of the Objector the Replying Affidavit of the Petitioner can be stated simply as to who between the Petitioner and the Objector is the lawful or rightful heir to the deceased's only property when he died intestate, namely land parcel Title No. NYAKI/NKABUNE/67. Before answering this question it is necessary to examine the relevant

provisions of the Law of Succession Act (Cap 160, Laws of Kenya) namely Sections 32 and 33 thereof.

Section 32 is comprised in Part V of the Law of succession Act and is entitled **INTESTACY**. The said section says.

“32 The provisions of this part shall not apply to-

(a) Agricultural land and crops thereon; or

(b) Livestock situated in such areas as the Minister may, by notice in the Gazettee specify.

33. The law applicable to the distribution on intestacy of the categories of property specified in Section 32 shall be the law or custom applicable to the deceased’s community or tribe as the case may be.

39(1) where an intestate has left no surviving spouse or children, the nett intestate estate shall devolve upon these kindred of the intestate in the following order of priority-

(a) father or if dead

(b) mother, or if dead,

(c) brothers and sisters, in equal shares, or if none,

(d) half brothers and half sisters and any children of deceased half brothers and half-sisters in equal shares; or if none,

(e) the relatives who are in the nearest degree of consanguinity upto and including the sixth degree in equal shares;

(2) failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1) the net intestate estate shall devolve upon the state and be paid into the Consolidated Fund.

The Objector’s case is hinged upon the provisions of Section 39 of the Law of Succession Act. His case and evidence and that of O.W.2, M’Rinchari M’Igweta and O.W.3 M’Mugaango M’Rukunga was that the Objector’s father, and the father of the deceased were brothers, and that he and the deceased were cousins within the first degree of consanguinity as is envisaged by Section 39 of the Law of Succession Act. The Petitioner did not contest this area of evidence or indeed the degree of consanguinity and so far as that aspect of the law is concerned the Objector’s case is not assailable. The only question is whether the Petitioner’s contention that he was adopted can displace any claim by the objector to the deceased’s estate on the grounds of consanguinity. In my considered it can, and has in this case, displaced the Objector’s claim to the deceased’s estate.

The reasons lie in the provisions of section 32 and 33 of the Law of Succession Act. Section 32 expressly provides that the provisions of Part V of the Act do not apply to (a) agricultural land and crops and (b) livestock. As the Minister has not specified in what area the land or livestock is situate, it must mean, agricultural land and livestock situate in the area in which the community or tribe referred to in Section 33 of the Act reside. Section 33 provides that the law applicable to the distribution on intestacy of the property specified in section 32 (that is to say agricultural land and livestock) is the law or custom of the deceased’s community or tribe; as the case may be.

The Petitioner contended, and consistently so, that he was the adopted son of the deceased. He was not a hired hand or labourer as the Objector and O.W. 2 contended. He built a house for the deceased because he lived with the deceased and took care of him until his death. When the deceased died, it is the Petitioner’ and not a member of the deceased’s clan who was issued with the Burial Permit. The Area Chief confirmed as much in his letter attached to the Replying Affidavit of the Petitioner.

At the burial of the deceased no relative of the deceased objected to the Petitioner's laying his hands on the deceased to give him a decent burial. No relative raised the issue of inheritance of the estate of the deceased or in particular Parcel Land as **NYAKI/NKABUNE/67**. P.W.2 Cicilia M'Rukaria whom the Petitioner brushed aside and refused to cross-examine testified that she was sister to the deceased and that the Petitioner was son to the deceased, her brother. That is a powerful statement and testimony to by a married sister of a deceased brother who had no biological children of his son. It was an acknowledgement that no matter what the rest of the clan said or thought, the Petitioner was her brother's adopted son.

The incidents of adoption according to the Petitioner's own testimony, and which testimony was not displaced by the evidence of either the Objector or O.Ws. 2 – 4, were that the Petitioner lived with the deceased for over twenty (20) years, he constructed a house for the deceased, the deceased paid five (5) cows as dowry for the Petitioner's marriage, the Petitioner lived and sired seven (7) children on the land, the Petitioner as a last mark of honour buried the deceased on his land. Those may not be all the incidents of adoption under Kimeru custom or common law and in the absence of any evidence to the contrary, that common law of the Ameru displaces inheritance to agricultural and livestock on the grounds of consanguinity under section 39 of the Law of Succession Act, and I so find and hold.

Would the Objector fair any better on the grounds that the Petitioner failed to disclose material facts or information when applying for the Grant, or that the Grant was obtained fraudulently or that the Petitioner made a false statement to the Court? I do not think so at all. What the Petitioner deponed in paragraph 4 of his Affidavit in Support of the Petition Grant of Letters of Administration intestate is what the Petitioner deponed in his Replying Affidavit sworn on 14th July 2004 in reply to the Objector's application for the annulment or revocation of the Grant of Letters of Administration and in his oral evidence that he was not the biological, but adopted son of the deceased. The incidents cited above give credence to that claim and there is therefore no fraud or fake statement on the part of the Petitioner.

Being therefore of the above mind, the Objector's Application dated 22nd April 2004 is dismissed with costs to the Petitioner. I also allow the Petitioner's Chamber Summons dated and filed on 13th June 2003 for Confirmation of the Grant of Letters of Administration in terms of paragraph 4 of the Petitioner's Affidavit sworn and filed on 13th June 2003, There shall be orders accordingly.

Dated and delivered at Meru this 30th day of June 2008.

M. J. Anyara Emukule

Judge.